(13)

No. 06-856

Supreme Court, U.S.
FILED
AUG 07 2007
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JAMES LaRUE,

Petitioner,

v.

DeWOLFF, BOBERG & ASSOCIATES, INC., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL[1]

The Air Line Pilots Association, International ("ALPA") is the largest union of airline pilots in the world and serves as collective bargaining representative for approximately 60,000 airline pilots employed by 41 air carriers in the United States and Canada. The vast majority of these pilots participate in individual account defined contribution pension plans. For many, the individual account plans have now become their sole retirement vehicle. ALPA therefore has a critical stake in the protection of the interests of participants in such plans and respectfully submits this brief urging reversal of that portion of the circuit court's decision holding that the petitioner, a participant in an individual account plan, could not recover on account of the plan fiduciary's failure to follow his asset allocation instructions because, in the opinion of the court, Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §1132(a)(2), "provides remedies only for entire plans, not for individuals."[2] (Pet. App. at 2a.) The Fourth Circuit's decision substantially impairs the ability of

1. Letters of consent to the filing of this brief have been filed with the Clerk of Court. This brief was not written in whole or in part by counsel for a party. No person or entity other than ALPA made a monetary contribution to the preparation or submission of the brief.

2. ALPA believes that the dismissal of the petitioner's complaint should be reversed on the ground that he stated a cause of action under ERISA Section 502(a)(2), 29 U.S.C. §1132(a)(2), and that consideration of the Fourth Circuit's ruling regarding ERISA Section 502(a)(3), 29 U.S.C. §1132(a)(3), is therefore not necessary. Accordingly, ALPA will not address that portion of the court's decision.

pilots and other defined contribution plan participants to remedy fiduciary breaches that reduce the assets in their plans. If allowed to stand, the decision may undermine the ability of individuals to accumulate adequate retirement savings in such plans, which have become prevalent both in the airline industry and throughout the economy generally.

Like employees throughout the economy, airline pilots have come to rely to an increasing extent on defined contribution plans for retirement. But pilots are particularly vulnerable to the inherent risks such plans pose to employees. In the past six years following the September 11 attacks, four of the five largest carriers have filed for bankruptcy. In each of these massive reorganizations, the pilots have entered into concessionary agreements that either froze or terminated their defined benefit pension plans. *See, e.g.*, *In re UAL Corp.*, 468 F.3d 456, 460 (7th Cir. 2006) (Posner, J.) (noting that without the pilots' concessions, including the termination of their defined benefit plan, United might have liquidated); *In re US Airways Group, Inc.*, 296 B.R. 734, 744 (Bankr. E.D. Va. 2003) (noting the necessity of terminating the pilots' defined benefit pension plan and acknowledging the magnitude of the pilots' sacrifices).

Historically, pilots, like many employees, relied on traditional defined benefit pension plan benefits for a secure retirement. In addition, at various carriers, the pilots had negotiated supplemental defined contribution plans, including 401(k) plans, such as the one at issue in this case. Now, however, most of ALPA's membership rely on defined contribution plans because their defined benefit plans have been either frozen (meaning participants no longer accrue benefits in them), or terminated and taken over by the Pension Benefit Guaranty Corporation (the "PBGC"). For instance,

US Airways, United Airlines, and Delta Airlines have all terminated their pilots' defined benefit plans, causing their pilots to lose up to seventy-five percent of the retirement income they had earned over the course of their careers. *See* Testimony of ALPA President John Prater, Before Congress, Retirement Security: Strengthening Pension Protections (May 3, 2007) http://www.alpa.org/Default.aspx?tabid=206 (last visited Aug. 3, 2007); *see also* Testimony of Bradley D. Belt, Executive Director, Pension Benefit Guaranty Corporation, Before the Subcommittee on Aviation, Committee on Transportation & Infrastructure, United States House of Representatives (June 22, 2005) http://www.pbgc.gov/media/news-archive/testimony/tm13159.html (last visited Aug. 3, 2007) (noting that as a result of the pilots' defined benefit plan termination at United Airlines, "[s]ome participants or their survivors may see benefits reduced by half or more because of statutory limits" on the PBGC pension guarantees).

Where traditional pensions have been frozen or terminated, ALPA has negotiated for new or increased employer contributions to individual account plans, attempting to preserve retirement security for its members. If current trends continue, the next generation of pilots may participate exclusively in individual account plans. Even now, pilots' predominant retirement coverage, like the rest of the country, is through individual account plans. Every carrier employing ALPA pilots sponsors an individual account plan, making these plans a key component of an ALPA pilot's compensation package and a critical subject in collective bargaining. Moreover, like the petitioner in this case, pilots typically participate in self-directed plans, where the individualized investment decisions of the participants make it likely that fiduciary breaches will affect single participants or small groups.

Individual account plans by definition impose greater risks on participants than do defined benefit plans. Depriving participants in such plans of the ERISA remedies that Congress provided for all pension plan participants unjustifiably exacerbates the vulnerabilities employees in individual account plans face. In defined benefit plans, participants accrue benefits through continued employment, and participants are guaranteed a specified periodic benefit regardless of the performance of the plan's investments. The risk that plan assets will not be sufficient to pay promised benefits falls on the employer, which funds the plan. By contrast, in an individual account plan, where the employer's obligation is limited to contributing only a specified amount to the plan, benefits are not guaranteed, and the investment risk falls on the employee, who may be left with an account upon retirement that is significantly less than the amount needed for an adequate retirement income. *See, e.g., Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439-40 (1999) (explaining differences between defined benefit and defined contribution plans).

Pilots are particularly vulnerable to the inherent risks of individual account plans, as well as to the possibility of unremedied breaches of duty by plan fiduciaries. Commercial pilots possess highly specialized job skills that require years of training and development and previous aviation experience. They therefore typically start their careers later in life than other workers and, at the same time, must retire early since they are subject to federal mandatory retirement at age 60. 14 C.F.R. §121.383(c). Thus, pilots have a shorter career span in which to save for retirement in such plans. In addition, pilots face a greater risk of job interruption due to disability than other workers. Pilots are subject to periodic medical certification, and medical conditions that may not

be disabling in other professions, such as diabetes or myocardial infarction, can ground a pilot temporarily or permanently.

In short, pilots typically must earn their retirement benefits over a shorter period of time, and with more frequent interruptions, than others in the workforce. Pilots thus have a particular need for ERISA's safeguards against fiduciary breaches because they may not have sufficient time to recover resultant losses. This need has only increased over the last decade with the proliferation of individual account plans and the elimination of defined benefit plans. By depriving individual account plan participants of ERISA's protections, the Fourth Circuit's decision frustrates the national goal of encouraging retirement savings. *See, e.g.*, Department of Labor Retirement Savings Education Campaign - Saving Matters http://www.dol.gov/ebsa/savingmatters.html (last visited Aug. 3, 2007).

In sum, ALPA has a vital interest in this Court overturning the Fourth Circuit's decision to ensure that individual account plan participants are afforded the protections supplied by ERISA against fiduciary breaches that diminish the assets in their plan as a whole, and their individual accounts in particular.

SUMMARY OF THE ARGUMENT

In this case, the Fourth Circuit ruled that a single participant in an individual account plan has no remedy under ERISA Section 502(a)(2) for a fiduciary breach that reduces the assets in the plan because any recovery will be allocated only to the participant's account. The court's reasoning finds no basis in the statute, and is contradicted by the legislative history and unsupported by this Court's precedent. ERISA Section 502(a)(2) provides for relief to "a participant" for "any loss" caused by "any" fiduciary breach. 29 U.S.C. §1132(a)(2). Accordingly, whether the recovery will be allocated to every participant's account in the plan, or allocated solely to a single participant's account, has no bearing on Section 502(a)(2) standing. As long as the recovery is sought to the plan for a breach affecting any account in the plan, as in this case, Section 502(a)(2) provides a remedy. The legislative history indicates that Congress intended this outcome. And this Court has already recognized in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), that Section 502(a)(2) provides a cause of action in cases like this one. For these reasons, ALPA respectfully requests that this Court reverse the Fourth Circuit's ruling.

ARGUMENT

I. The Fourth Circuit's Decision Conflicts With the Statutory Text

The Fourth Circuit's ruling that ERISA Section 502(a)(2) does not provide relief for the petitioner's claim is at odds with the plain language of the statute. Under the guise of refusing to recognize new causes of action that Congress "simply forgot to incorporate expressly" (Pet. App. at 4a (quoting *Russell*, 473 U.S. at 146)), the Fourth Circuit has written out of ERISA a cause of action that Congress did include expressly. Section 502(a)(2) creates a cause of action for "*a* participant . . . for appropriate relief under section 1109 of this title. . . ." 29 U.S.C. §1132(a)(2) (emphasis added). Under ERISA Section 409(a), 29 U.S.C. § 1109(a), "[a]ny person who is a fiduciary with respect to a plan who breaches *any of the responsibilities, obligations, or duties* imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan *any losses* to the plan resulting from each such breach. . . ." (emphasis added). Section 502(a)(2) thus expressly authorizes a single participant in any pension plan, including an individual account plan, to sue a plan fiduciary for any loss to the plan.

The Fourth Circuit acknowledged that "the recovery plaintiff seeks could be seen as accruing to the plan" because it would be paid to the plan. (Pet. App. at 6a.) It nonetheless held, however, contrary to the plain language of the statute, that the petitioner had not stated a cause of action under Section 502(a)(2) because the plan would receive the payment only "in the narrow sense that [the recovery] would be paid into plaintiff's personal plan account. . . ." (Pet. App. at 6a.) Whether in a narrow or broad sense, however, the payment

would be made to the plan, which is all the statute requires, regardless of whether the recovery is allocable to one, several, many, or all of the accounts in the plan.

In finding Section 502(a)(2) not satisfied, the Fourth Circuit erroneously focused on the "personal" benefit that will result from any recovery in this case and effectively read the plan out of existence, as if the petitioner upon prevailing would receive a cash payment in his personal bank account. In this, the court of appeals was mistaken. There is a fundamental difference between receiving a cash payment, as sought by the plaintiff in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), which can be used at the recipient's discretion, and having the same amount of money paid to a retirement plan, albeit on the participant's behalf as in this case, where the account is restricted by law and not distributable until a stated event. Indeed, calling such an account "personal" may be a misnomer. The required individual accounts are bookkeeping entries only; they are not actual individual bank accounts or individual retirement arrangements owned by the participants. S. Sacher, *Employee Benefits Law* 175 (2d ed. BNA 2000). In fact, even though a recovery might be allocable to an individual account in a defined contribution pension plan, there is no guarantee that the participant will actually receive that amount since the ultimate value of the account depends on its investment performance throughout the period of eligibility until actual withdrawal.

Entitlement to and distribution of pension benefits from individual account retirement plans is strictly regulated. Depending on the design of the plan, employer contributions may, but need not be, distributable while an employee is still employed after the passage of a certain number of years, while

salary deferral contributions to a 401(k) plan are generally not distributable until separation from employment or attainment of age 59-1/2, except in the case of a narrowly defined "hardship," as set out in Treasury Regulations. 26 U.S.C. §401(k)(2)(B)(i)(IV); 26 C.F.R. §1.401(k)-1(d). Thus, a recovery to a plan paid by a breaching fiduciary, even if allocated to one or more individual accounts, cannot be accessed or used at will by the participant. The participant cannot use the recovery to pay for clothing, food, rent, commuting, gifts, or other day-to-day living expenses not rising to the level of a "hardship" as defined in the Regulation. The court's implication that payment of the recovery to the plan is tantamount to payment to the individual because it is allocated to a participant's individual account and thus is the same as a "personal" recovery simply flies in the face of reality.

The truth is that the restrictions on accessing assets of individual accounts in defined contribution plans are intended to serve ERISA's central purpose of preserving money for retirement and ensuring that participants do not squander their retirement assets during their working years. That purpose should not be thwarted by wrongly denying individual account plan participants protection under Section 502(a)(2) merely because any recovery to such a plan will be allocated among individual accounts.

Not only did the Fourth Circuit conflate a payment to the plan with a payment directly to a plan participant, it misconstrued the nature of the plan itself. The court reasoned that a participant who "desires recovery to be paid into his plan account" does not seek relief to the plan as required by Section 502(a)(2). (Pet. App. at 6a.) Similarly, in its denial of the petition for rehearing and a hearing *en banc*, the Fourth

Circuit distinguished other cases properly brought under Section 502(a)(2) where "an individual plaintiff sues on behalf of the plan itself or on behalf of a class of similarly situated participants," stating that in such a case, "the remedy will undoubtedly benefit the plaintiff and other participants in the plan, but it does not solely benefit the individual participants." (Pet. App. at 6a (citations and internal quotations omitted).)

But an individual account plan is nothing more and nothing less than a pooled trust held solely for the benefit of the participants. *See, e.g., Hughes Aircraft*, 525 U.S. at 439-40. Any recovery to any individual account plan in a Section 502(a)(2) fiduciary breach case will necessarily be paid into the participants' accounts, because there is nowhere else to pay it. *See* Dan M. McGill, et al., *Fundamentals of Private Pensions* 247-48 (7th ed. 1996).

The Fourth Circuit's attempt to distinguish this case from one brought by a "subset" of participants (Pet. App. at 26a) fails because *one* participant is a "subset." In any event, to distinguish between a case with one or several plaintiff participants creates an arbitrary and unworkable guide to courts evaluating Section 502(a)(2) claims. There is simply no principled way, and no statutory basis, to set a numerosity requirement for Section 502(a)(2) actions. If one is too few, are 10, 100, 500, or 1,000 enough? How is a court to decide? Indeed, if Congress wanted to establish a numerical threshold for participants' standing, it would have done so.

In its denial of the petition for rehearing, the court suggested that Section 502(a)(2) is available only for certain types of fiduciary breaches and, thus, unjustifiably added a restriction to Section 502(a)(2) that is not found in the text

of the statute. Specifically, the court criticized the Secretary of Labor for seeking to force fiduciaries to "face personal liability for every wrong alleged by individual beneficiaries, even in the absence of personal profit or misuse of plan assets. . . ." (Pet. App. at 28a.) This narrow interpretation of ERISA's fiduciary duties truncates the broad reach of the statute, which imposes liability on fiduciaries for breaching "*any* of [their] responsibilities, obligations, or duties" for "*any* losses to the plan resulting from each such breach. . . ." 29 U.S.C. §1109 (emphasis added). There is no basis for concluding that actionable fiduciary breaches are limited to breaches involving personal profit or misuse of plan assets. Holding so would vastly limit the remedies available to plan participants who are harmed by fiduciary breaches. Again, if Congress had intended such a limit, it would have written one in the statute.

The claims in this case allege a breach of the duty that goes to the very heart of the fiduciary's responsibility to beneficiaries. Under both traditional trust law and ERISA, the fiduciary owes a duty of loyalty to the beneficiaries. *See* ERISA §404(a)(1), 29 U.S.C. §1104(a)(1); Restatement (Third) of Trusts §78(1) (Duty Of Loyalty); *Pegram v. Herdrich*, 530 U.S. 211, 235 (2000) (ERISA requires that fiduciaries have " 'an eye single' toward beneficiaries' interests" (quoting *Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir. 1982))). A trustee who has failed to carry out the express wishes of a beneficiary, as is the allegation in this case, has violated this core fiduciary responsibility. There is no support in the text of the statute for denying the petitioner a remedy.

II. The Fourth Circuit's Decision Conflicts With the Legislative History

ERISA's legislative history confirms that Congress contemplated that an individual account plan participant might sue for breach of a fiduciary duty even though only the individual would "benefit" from the litigation. For example, in discussing the Section 404(c)[3] defense available against alleged fiduciary breach claims when participants direct the investments of their accounts in 401(k) plans, the Conference Report states that a fiduciary would be liable to a plan for investing a single participant's assets in an investment prohibited by the plan. *See* H.R. Conf. Rep. No. 93-1280 (1974), reprinted in 1974 U.S.C.C.A.N. 5038, 5085-86. The Report explains that:

> [A] special rule is provided for individual account plans where the participant is permitted to, and in fact does, exercise independent control over the assets in his individual account. In this case, *the individual* is not to be regarded as a fiduciary and other persons who are fiduciaries with respect to the plan are not to be liable for any loss that results from the exercise and control by the participant or beneficiary. Therefore, if *the participant* instructs the plan trustee to invest the full balance of *his account* in, *e.g.*, a single stock, the trustee

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3. ERISA Section 404(c), 29 U.S.C. §1104, provides that a participant who exercises control over his or her account in an individual account plan that meets certain requirements set forth in the applicable regulations shall not be treated as a fiduciary with respect to such account, and that no person who is otherwise a fiduciary of the plan shall be liable under ERISA for any loss resulting from the participant's exercise of such control.

> is not to be liable for any loss because of a failure to diversify or because the investment does not meet the prudent man standards. However, the investment must not contradict the terms of the plan, and *if the plan on its face prohibits such investments, the trustee could not follow the instructions and avoid liability.*

Id. at 5085-86 (emphasis added). This last sentence demonstrates that Congress contemplated that a trustee *could* be liable to a single participant in an individual account plan if he or she breaches his or her fiduciary duties.

III. *Russell* Provides No Support for the Fourth Circuit's Decision

Nothing in this Court's decision in *Russell* prohibits a single participant from suing a fiduciary for recovery to the plan. In *Russell*, the plaintiff sued plan fiduciaries to recover consequential and punitive damages, to be paid to herself, for an aggravated psychological condition and back ailment allegedly suffered as a result of the temporary interruption in her disability benefits. *Russell*, 473 U.S. at 136. In holding that the plaintiff lacked standing under Section 502(a)(2), the Court ruled that a Section 502(a)(2) recovery must be paid to the plan and not directly to the participant. In holding that ERISA Section 409 did not contemplate the individualized relief sought by Mrs. Russell, the Court cited Congress' intent that ERISA protect "the entire plan" rather than "the rights of an individual beneficiary." *Id.* at 142.

The Fourth Circuit took the relevant phrases of *Russell* out of context. *Russell's* discussion of the requirement that a fiduciary breach claim "protect the entire plan," or that it be brought on behalf of "the plan as a whole" was intended to distinguish appropriate 502(a)(2) claims from those where the recovery would be paid directly to the plaintiff. The issue here, failure to invest plan assets according to the participant's directions, is precisely the type of claim *Russell* permits under Section 502(a)(2).

CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Dated: August 6, 2007

Respectfully submitted,

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